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No. 06-900

IN THE

# Supreme Court of the United States

FIRST NATIONAL BANK OF AMES, IOWA,
*Petitioner,*

v.

INNOVATIVE CLINICAL AND CONSULTING SERVICES, LLC
d/b/a TOCO HILLS URGENT CARE,
*Respondent.*

On Petition for Writ of Certiorari To The
Georgia Court of Appeals

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

May a forum state exercise personal jurisdiction over a non-resident defendant whose contacts with the forum state are insubstantial and do not "arise out of a relate to" the plaintiff's cause of action?

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## PREVIOUS OPINIONS

The Order of the Supreme Court of Georgia denying the Petition for Certiorari of First National Bank of Ames, Iowa, to that Court, entered October 2, 2006, Supreme Court Case No. S06C2001, is not reported and is reproduced at Pet. App. 1a.

The Order of the Georgia Court of Appeals denying the Motion for Reconsideration of First National Bank of Ames, Iowa, entered July 10, 2006, is not reported and is reproduced at Pet. App. 2a.

The Memorandum Opinion and Order of the Georgia Court of Appeals, entered June 20, 2006 is reported at *First National Bank of Ames, Iowa v. Innovative Clinical & Consulting Services, LLC.*, 280 Ga. App. 337, 634 S.E.2d 88 (2006) and is reproduced at Pet. App. 3a-6a.

The Memorandum Opinion and Order of the Supreme Court of Georgia, entered October 3, 2005, Supreme Court Case No. S04C1413 is reported at *Innovative Clinical & Consulting Services, LLC. v. First National Bank of Ames, Iowa*, 279 Ga. 672, 620 S.E.2d 352 (2005), and is reproduced at Pet. App. 7a-12a.

The Order of the Georgia Court of Appeals denying the Motion for Reconsideration of Innovative Clinical & Consulting Services, LLC, entered April 8, 2004, is not reported and is reproduced at Pet. App. 13a.

The Memorandum Opinion and Order of the Georgia Court of Appeals, entered March 24, 2004 is reported at *First National Bank of Ames, Iowa v. Innovative Clinical & Consulting Services, LLC.*, 266 Ga. App. 842, 598 S.E.2d 530 (2004) and is reproduced at Pet. App. 14a-22a.

The Order Denying Motion to Dismiss and Certificate of Immediate Review of the Superior Court of Fulton County, entered December 23, 2002, Civil Action File No.

2001cv46283, is not reported and is reproduced at Pet. App. 23a-25a.

## BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C § 1257 to review by writ of certiorari the judgment of the Court of Appeals of Georgia dated June 20, 2006, which is the subject of this Petition, in which case a petition for certiorari was denied by the Supreme Court of Georgia on October 2, 2006.

## CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91.

U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 9-10-91:

> A court of this state may exercise personal jurisdiction over any non-resident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:
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> (1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
(4) Owns, uses, or possesses any real property situated within this state; or
(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

## STATEMENT OF THE CASE

This case involves a complaint filed in the State of Georgia against a non-resident bank alleging that the non-resident bank committed certain torts and breaches of contract in the administration and operation of two bank accounts located wholly in the State of Iowa, which were established by Iowa citizens and governed by account agreements executed and performed wholly in the State of Iowa. [R. 005].

Respondent Innovative Clinical and Consulting Services, LLC ("ICCS") filed this suit against Petitioner First National Bank of Ames, Iowa ("First National") to recover damages it claimed as a result of an outsourcing relationship ICCS entered into with an Iowa company that happened to be a

customer of First National. [R. 005].

ICCS is a doctor's office located in Atlanta, Georgia. [Pet. App. 14a]. In April of 2001, ICCS made the decision to outsource some of its billing and collection operations. It outsourced these functions to a company in Iowa where these functions were to be performed. ICCS entered into two separate contracts to facilitate this outsourcing. [Pet. App. 15a]. First, ICCS entered into a Services Agreement with two entities called Med e Fund Corporation and MeF Corporation. [R. 005; 016-017]. Under this agreement, Med e Fund agreed to advance money to ICCS for its receivables and agreed to take charge of the invoicing to and collection from third-party payors for ICCS. [R. 005; 016-017]. Second, ICCS entered into a Lease Agreement with an Iowa company called A.C. Financial. [R. 005; 018-024]. Under this agreement, ICCS leased the hardware and software it needed to facilitate the invoicing to third-party payors. [R. 005; 018-024]. The Lease Agreement provided that it would be effective upon delivery to A.C. Financial's headquarters in Iowa, thus ensuring that the agreement would be governed by Iowa law. Moreover, the Lease Agreement provided that any dispute would be resolved in the courts of Iowa. [R. 005; 018-024].

Under the agreements, ICCS and its outsourcing partners agreed to open bank accounts necessary to facilitate their relationship in Iowa. A.C. Financial went to First National in Ames, Iowa and opened two bank accounts [R. 004; 064]. First National is a bank which provides banking services wholly within the State of Iowa. [R. 063]. First National does not have offices or employees outside of Ames, Iowa. [R. 063]. Both ICCS and A.C. Financial were permitted to transact business on these accounts. [R. 064]. Payments from third-party payors were to be deposited into one of the bank accounts. [R. 065].

In addition, First National assumed limited responsibility for servicing the ICCS lease. [R. 065]. This "servicing" was

limited to automatically debiting one of the accounts for lease payments due and depositing that sum into the second account. First National invoiced ICCS for the payment due when, on one occasion, an automated debiting transaction was rejected. [R. 065].

First National later provided a loan to A.C. Financial. To secure that loan, First National took a security interest in the Lease Agreement between A.C. Financial and ICCS. [R. 357]. All actions taken to enforce that security interest have been taken in Iowa.

It is undisputed that the only contact First National had with the State of Georgia in connection with this matter was that the bank statements and correspondence concerning the account were mailed to ICCS and that First National responded to an occasional phone call from ICCS regarding the account. [Pet. App. 16a].

ICCS brought suit against First National on December 6, 2001 in the Superior Court of Fulton County, Georgia. ICCS's claims against First National included claims for: a) fraud and conversion related to the accounts maintained by First National in the name of ICCS in the State of Iowa; b) an accounting of funds and breach of contract related to those accounts; c) an injunction concerning funds in those accounts; and d) a rescission of the Lease Agreement and Services Agreement.[1] [Pet. App. 16a]

Respondent ICCS contended that the Georgia courts had personal jurisdiction over First National pursuant to the Georgia Long-Arm Statute. O.C.G.A. § 9-10-91. First

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[1] Since the Lease Agreement contains a forum selection clause providing that actions regarding the Lease Agreement are to be brought in Iowa, the Lease Agreement does not provide a basis for jurisdiction over First National in Georgia. [R. 005; 018-024].

National moved to dismiss this action for lack of personal jurisdiction contending that insufficient minimum contacts existed on which jurisdiction might be predicated and that the plaintiff's claims did not arise out of any contacts First National did have with the State of Georgia. The Honorable T. Jackson Bedford, Superior Court of Fulton County, denied First National's motion to dismiss. [Pet. App. 23a-25a]. First National appealed the decision to the Court of Appeals of Georgia. The Court of Appeals held that First National did not have the requisite minimum contacts with the State of Georgia to subject First National to personal jurisdiction in Georgia and that personal jurisdiction did not exist over First National pursuant to the 'transacts business' prong or the 'tort prongs' of the Georgia Long-Arm Statute. [Pet. App. 14a-22a, at 19a-20a]. Respondent ICCS petitioned the Supreme Court of Georgia for a review of the Court of Appeals' Decision.

The Supreme Court of Georgia elected to hear the petition. In its opinion, the Supreme Court of Georgia dramatically altered the pre-existing law of personal jurisdiction in the State of Georgia, holding that the 'transacts business' prong of the Georgia Long-Arm Statute was no longer restricted, except by the bounds of procedural due process. [Pet. App. 7a-12a, at 11a]. The Supreme Court of Georgia affirmed the Court of Appeals' holding in part, finding that the trial court could not exercise personal jurisdiction over First National pursuant to the 'tort prongs' of the Georgia Long-Arm Statute. The Supreme Court of Georgia vacated the Court of Appeals' decision as it related to the 'transacts business' prong of the Georgia Long-Arm Statute and remanded the case for further consideration consistent with its opinion.

On remand, the Court of Appeals of Georgia held that First National's isolated contacts with the State of Georgia were sufficient to confer personal jurisdiction over First National, even though the claims asserted did not arise out of

those isolated contacts. The Court of Appeals then affirmed the Superior Court's denial of First National's motion to dismiss. [Pet. App. 3a-6a, at 5a-6a].

Following the Georgia Court of Appeals' second opinion, First National petitioned the Supreme Court of Georgia for a writ of certiorari. The Supreme Court of Georgia denied First National's petition. [Pet. App. 1a].

## REASONS FOR GRANTING THE WRIT

### I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATES AS TO WHEN A CAUSE OF ACTION ARISES OUT OF OR RELATES TO ACTIVITIES IN THE FORUM STATE FOR THE PURPOSE OF ASSERTING 'SPECIFIC' *IN PERSONAM* JURISDICTION.

This case presents the question of what relationship must exist between a plaintiff's cause of action and a defendant's contacts with the forum state to support the assertion of "specific" *in personam* jurisdiction consistent with the Due Process Clause of the Fourteenth Amendment. This Court has previously considered this issue, but has yet to resolve it. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984); *Carnival Cruise Line v. Shute*, 499 U.S. 585 (1991).

A finding of specific jurisdiction requires a degree of relatedness among the "defendant, the forum and the litigation" in order to satisfy the requirements of due process. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). More specifically, the plaintiff's claim must "arise out of or relate to" the non-resident defendant's contacts with the forum state. *Helicopteros*, 466 U.S. at 414 n. 8.[2] This requirement

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[2] As this Court noted in *Helicopteros*, "When a controversy is related to or arises out of a defendant's contacts with the forum, the Court has said that a relationship among the defendant, the forum and the litigation

originated with this Court in *International Shoe Co. v. Washington*, but has never been defined. 326 U.S. 310, 319 (1945).[3] In both *Helicopteros* and *Shute*, this Court declined to settle the issue of how the "arise out of or relate to" requirement should be interpreted. In *Helicopteros*, this Court declined to address the issue because the parties did not make arguments based upon the "arise out of or relate to" requirement and thus, conceded that the cause of action did not "arise out of or relate to" the defendant's activities. *Helicopteros*, 466 U.S. at 415.[4]

The issue surfaced again in *Shute* where the petitioner raised the question of whether a negligence action could "arise out of or relate to" the defendant's advertising and ticket sales in the forum state for cruise vacations. *Shute*, 499

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is the essential foundation of in personam jurisdiction." 466 U.S. at 414 (citing *Shaffer*, 433 U.S. at 204).

[3] *Burnham v. Superior Court*, 495 U.S. 604, 618 (1990) (noting that the "arise out of or relate to" language originated in *International Shoe* and reaffirming the standard requiring that a cause of action must "arise out of or relate to" the defendant's contacts with the forum state); *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985) (same); *Helicopteros*, 466 U.S. at 414 (same); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444-45 (1952) (same). *See also Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994) (noting that the "arise out of or relate to" analysis is the least developed prong of the specific jurisdiction inquiry).

[4] *Helicopteros*, 466 U.S. at 415 n. 10. ("Absent any briefing on the issue we decline to reach the questions (1) whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action 'relates to,' but does not 'arise out of,' the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.").

U.S. at 588-89. The Court declined to address the issue of whether the Ninth Circuit's expansive interpretation of the "arise out of or relates to" standard was appropriate in that case, and instead disposed of the case on other grounds. *Id.* at 589.[5]

The question of how the "arise out of or relate to" requirement should be interpreted is now ripe for decision.[6] The issue is one that frequently arises and has been resolved in many conflicting ways by the state courts and lower federal courts. Those courts have developed their own differing and inconsistent judicial constructs on how far the scope of the relatedness requirement should extend. Legal commentators have debated this issue for years.[7] Thus, the issue has been

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[5] The Court in *Shute* held that because a decision on the forum selection clause issue was dispositive of the case, the Court need not address the constitutional question of what "arise out of or relate to" means. *Id.*

[6] *See* Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 737 (1988) ("Just what courts mean when they speak of this amorphous concept of relatedness, however, is simply unclear. Practically any contact might appear to be related to the cause of action and thus support specific jurisdiction. In short, such a vague term offers a state an apparently boundless jurisdictional reach – a result out of step with our notions of due process.").

[7] *See, e.g.*, Lawrence W. Moore, *The Relatedness Problem In Specific Jurisdiction*, 37 Idaho L. Rev. 583, 591-93 (2001) (discussing the debate amongst scholars concerning the degree of relatedness required to find specific jurisdiction); Mary Twichell, *The Myth Of General Jurisdiction*, 101 Harv. L. Rev. 610, 653 -54 (1988) (arguing for a looser definition of the relatedness requirement); Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444 (1988) (arguing for a more narrow definition of the relatedness requirement); William M. Richman, *Review Essay, Part I Casad's Jurisdiction in Civil Actions; Part II A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 Cal. L. Rev. 1328, 1345 (1984) (advocating a "sliding scales" approach to the relatedness requirement); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or*

sufficiently developed for a resolution by the Court and this case presents an excellent context for deciding it.

### A. The Due Process Clause of the Fourteenth Amendment Requires Certain Minimum Contacts to Support Long-Arm Jurisdiction.

For jurisdiction to exist over a defendant in accordance with a state's long-arm statute, including Georgia's long-arm statute, the requirements of the Due Process Clause of the Fourteenth Amendment must be met. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985); *Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc.*, 444 F.3d 1361 (11th Cir. 2006); *Railcar Ltd. v. Southern Illinois Railcar Co.*, 42 F. Supp. 2d 1369, 1371-72 (N.D. Ga 1999).[8] "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations'." *Burger King*, 471 U.S. at 471-72 (citing *International Shoe*, 326 U.S. at 319). Thus, a key tenet of the due process analysis is that a defendant must have certain "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citations omitted).

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*Specific Jurisdiction, but Is It Constitutional?*, 48 Case W. Res. L. Rev. 559, 580-82 (1998) (calling for a hybrid approach for in-between cases).

[8] *See also Fowler Prods. Co., Inc. v. Coca-Cola Bottling Co. of Tulsa, Inc.*, 413 F. Supp. 1339, 1341-42 (D.C. Ga. 1976) (holding that minimum contacts did not exist for purposes of due process where defendant did nothing within forum state except accept goods under a FOB contract and address mail to a Georgia address concerning partial payment under the contract); *Addy v. Club Med.*, No. 95-0035, 1997 WL 30205, at *4 (E.D. La. Jan. 23, 1997) (holding that simply conducting business with someone residing in the forum state is insufficient to support jurisdiction).

A due process analysis contemplates two types of personal jurisdiction – general or specific jurisdiction. *Helicopteros*, 466 U.S. at 414-15 nn. 8-9.

General jurisdiction arises only from "continuous and systematic" contacts between the non-resident defendant and the forum state. The non-resident's activities must be "continuous and systematic" for general jurisdiction to exist over the non-resident. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952); *Railcar*, 42 F. Supp. 2d at 1371-72, 1377 (citing *Helicopteros*, 466 U.S. at 410-18). In order to assert general jurisdiction, the non-resident's contacts with the forum must be more than "random and fortuitous." *Helicopteros*, 466 U.S. at 416-17.

For specific jurisdiction to exist, however, a non-resident's activities need not be continuous and systematic. Instead, the defendant must have "'purposefully directed' his activities at residents of the forum . . . and the litigation [must result] from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 471-72.[9]

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[9] Courts have delineated the specific jurisdiction due process test into a three-part inquiry: (1) the non-resident defendant must purposely avail himself of the privilege of conducting activities in the forum state (2) the claim must be one which "arises out of or relates to" the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *See, e.g., Christian Science Bd. of Directors of First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 216 (4th Cir. 2001); *United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 621 (1st Cir. 2001); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1546 (11th Cir. 1993); and *Rambo v. American So. Ins. Co.*, 839 F.2d 1415, 1419 n. 6 (10th Cir.1988). The test applies the principles of *Asahi Metal Indus., Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (considering several factors to determine whether the exercise of jurisdiction is so unreasonable as to violate "fair play and substantial justice"); *Burger King*, 471 U.S. at 474-76 (finding that a non-resident defendant must purposely avail himself of the privilege of conducting activities in the forum state and that defendant's contacts must be related to the plaintiff's cause of action or

Regardless of whether a due process analysis contemplates general or specific jurisdiction, a defendant must meet the criteria of purposeful availment for a court to exercise jurisdiction over it. *See, e.g., Burger King*, 471 U.S. at 475-76.

First National has not purposefully availed itself of the laws of the State of Georgia and has not had the requisite minimum contacts with the State of Georgia for personal jurisdiction to exist in Georgia. The present dispute involves bank accounts that were established at an Iowa bank through actions taken wholly in Iowa and controlled by contracts executed and to be performed in Iowa.[10] Such contacts are not sufficient to constitute 'minimum contacts' with the State

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give rise to it); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 297 (1980) (finding that the exercise of jurisdiction must be reasonable); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (finding contacts must involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum"); and *International Shoe*, 326 U.S. at 319 (requiring that a claim arise out of or relate to defendant's contacts with the forum).

[10] While the plaintiff has also sought the rescission of the Lease Agreement, the venue for disputes involving that contract is governed by a choice of venue clause and thus not germane to the jurisdictional dispute here. [R. 005; 018-024]. Even when a party seeks rescission of a contract, the forum selection clause in that contract stands. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 at n. 14, 94 S.Ct. 2449, 2457 (1974) (rejecting the notion that "any time a dispute arising out of a transaction is based upon an allegation of fraud ... the [forum-selection] clause is unenforceable," and holding that rather, a "forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion."); *Republic Credit Corp. I v. Rance*, 172 F. Supp. 2d 1178, 1183 (S.D. Iowa 2001) (same).

of Georgia for purposes of personal jurisdiction. *See Hanson v. Denckla*, 357 U.S. 235 (1958).[11]

### B. There Is a Serious Division of Authority Among State and Federal Courts Regarding the Interpretation of the Phrase "Arise Out of or Relate To."

Since this Court decided *Helicopteros*, the lower federal and state courts have varied widely in their interpretation of how the "arise out of or relate to" requirement for specific personal jurisdiction should be interpreted. The courts have essentially developed two main conflicting tests, with various interpretations of those tests and names for those tests, to address the issue of what relationship must exist between the litigation and the defendant's activities in the forum state so

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[11] In *Hanson v. Denckla*, this Court held that a Florida court did not have specific personal jurisdiction over a Delaware trustee in an action concerning the parties' rights to a trust. The controversy in *Hanson* involved the validity of a trust agreement that was executed in Delaware by a trust company incorporated in Delaware and by a settler domiciled in Pennsylvania. *Id.* at 252. The defendant's only contacts with Florida involved the remittance by mail of trust income to beneficiaries who moved to that state after the trust was formed. *Id.* Analyzing these facts, this Court held that the lawsuit "[could] not be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida." *Id.* Rather, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. Accordingly, because the cause of action was not one that arose out of an act done or consummated in Florida, jurisdiction over the defendant did not exist. *Id.* at 251.

*See also Bertke v. Cartledge*, 597 F. Supp. 68, 71-72 (D.C. Ga. 1984) (finding Georgia defendant whose business was located solely in Georgia did not purposefully avail himself of the privileges of the forum State of Kentucky, where the defendant had never visited or done business in Kentucky, the contract at issue was to be performed wholly in Georgia and the plaintiff was the first to initiate contact with the defendant).

as to support the assertion of specific jurisdiction. Essentially, the debate is split between those courts who advocate that a weak connection to the forum is sufficient, and those courts who advocate that a stronger connection to the forum is warranted to exercise personal jurisdiction over an out-of-state defendant.

The primary conflicting tests developed by courts include: the "but for" test and the "substantive relevance-proximate cause" test, although the courts may use different terms to identify the test used.[12]

Many courts have adopted the "but for" test. The "but for" test considers whether a plaintiff's claims would have arisen 'but for' the defendant's contacts with the forum state. *Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001); *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).[13] The "but for"

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[12] Several different tests have been promoted by various courts and scholars, but all roughly fall into either the "but for" or "proximate cause" category or are a derivative of the two tests. *See, e.g.*, Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 Cal. L. Rev. 1545, 1579-84 (1994) (identifying the following possible relatedness tests as an alternative to the "but for" test: (1) the "substantive relevance" test, (2) the "could have been causation" test or (3) the "sliding scales" theory).

[13] *See also Prejean v. Stonatrach, Inc.*, 652 F.2d 1260, 1270 n. 21(5th Cir. 1981) (suggesting that specific jurisdiction can be found in situations where 'but for' the parties entering into a contract, a tort action would not have arisen), *but see Luna v. Compania Panamena De Aviacion, S.A.*, 851 F. Supp. 826, 832-33 (S.D. Tex. 1994) ("The question of whether a cause of action arises out of or relates to a defendant's forum contact is analogous to the issue of proximate cause in tort law.") (citation omitted); *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp. 1383, 1389-90 (E.D. Tex. 1989) (noting that courts were inclined to take a more restrictive view of what the phrase 'arise out of and relate to' requires).

test is considered an expansive test because there is no limit on how far the test can logically extend. Conceivably, almost any remote contact that a defendant has with a forum state can be the basis for specific jurisdiction if it can be couched as, "but for" the defendant's contact with the forum state, no matter how remote, the plaintiff's cause of action would not have occurred.[14] Other courts have employed the substantive relevance-proximate cause test, which provides a more strict interpretation of the phrase "arises out of or relates to." Under this test, some courts and scholars believe that it requires that the cause of action be "substantially related" to the defendant's contacts with the forum state. *See Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002).[15] *See also* Lea

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The Seventh Circuit applies a 'but for' test but generally uses the term 'lies in the wake' to describe it. *See Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984) (finding the pre-contractual negotiations between the parties in the forum state "lies in the wake" of the breach of warranty action and thus, specific jurisdiction may be found); *In re Oil Spill by Amoco Cadiz Off Coast of France*, 699 F.2d 909 (7th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) (the contract negotiations and signing of contract in the forum state "lies in the wake" of the action for damages related to an oil spill caused by the break-up of an oil tanker).

[14] In rejecting the "but for" test, the First Circuit has described this test as follows: "A 'but for' requirement . . . has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain . . .". *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996).

[15] *See also Sawtelle v. Farrell* 70 F.3d 1381, 1389 (1st Cir. 1995) ("The relatedness requirement is not met merely because a plaintiff's cause of action arose out of the general relationship between the parties; rather, the action must directly arise out of the specific contacts between the defendant and the forum state."); *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 104 (3rd Cir. 2004) (The Third Circuit held that, "[a]lthough we have not expressly articulated our view on the "arise out of or relate to" requirement, our cases implicitly apply an immediate or proximate cause standard."); *Pearrow v. National Life and Acc. Ins. Co.*, 703 F.2d 1067,

Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 82 (1981) ("A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits."); Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1451-58 (1988) (using the term "substantive relevance").

Some courts analogize the proximate cause test to the proximate cause requirement under tort law. *See Luna v. Compania Panamena De Aviacion, S.A.*, 851 F. Supp. 826, 832-33 (S.D. Tex. 1994).[16] Courts have suggested that under the proximate cause test, the forum contacts must be a material proof of an element of the cause of action. *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986) (interpreting Massachusetts long arm statute, which employs a proximate cause analysis to the relatedness requirement, and finding plaintiffs' hotel reservations were not "a material element of proof in their slip and fall case").

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1069 (8th Cir. 1983) (The Eighth Circuit appears to employ a proximate cause analysis in interpreting Arkansas' long arm statute and finding the defendant's connection to the forum too tenuous to find that plaintiff's cause of action for negligence "arose out of" activity in the state); *First Mortgage Corp. v. State Street Bank and Trust Co.*, 173 F. Supp. 2d 1167, 1175 (D. Utah 2001) ("A 'nexus' must exist between the plaintiff's claims and the defendant's acts or contacts."), *but see, Beverly Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 456-57 (10th Cir. 1996) (holding that the 'arise out of' requirement for specific jurisdiction was not satisfied where the plaintiff's accident would have occurred in the forum state even if the defendant had not made the contacts relied upon by the plaintiff).

[16] *See, e.g., Pizarro v. Hoteles Concorde Int'l*, 907 F.2d 1256, 1259 (1st Cir. 1990) (interpreting Puerto Rico's long arm statute, which is akin to the due process specific jurisdiction analysis, and determining, "[w]hether certain events arise out of a non-resident defendant's actions within the forum state is comparable or analogous to whether certain actions can be said to be the legal, or proximate cause of injuries suffered by a plaintiff").

Other courts have, instead of specifically adopting either of the main two tests, developed their own definition of what "arise out of or relates to" means.[17] Some state courts have declined to adopt either the "but for" or the proximate cause standard. Instead, these state courts apply their own interpretation of what the "arise out of or relate to" phrase means.[18] Other state courts decline to articulate any test and

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[17] *See, e.g., Woods Intern., Inc. v. McRoy*, 436 F. Supp. 2d 744, 749 (M.D. N.C. 2006) (citing *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 713-14 (4th Cir. 2002) (noting that the Fourth Circuit has adopted a "sliding scales" approach to analyzing internet based contacts); *Chew v. Dietrich*, 143 F.3d 24, 29-30 (2d Cir. 1998) ("Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts."); *Static Control Components, Inc. v. Intersolution Ventures Ltd.*, No. 1:05CV004017, 2006 WL 2042900, at *8-9 (M.D. N.C. July 17, 2006) ("In determining whether a claim is sufficiently related to forum-related activities, circuits have applied different tests . . . In this case, there is a sufficient connection between the claims and contacts under either test to support personal jurisdiction.").

[18] **California:** *Vons. Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1093-97, (Cal. 1996), *cert. denied*, 522 U.S. 808 (1997) (addressing the strengths and weakness of both tests and finding the "but for" test to be overly broad and the "proximate cause" test too narrow and instead, reaffirming a test that it had already articulated in earlier California case law: "The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction."); **Missouri:** *Davis v. Baylor University*, 976 S.W.2d 5, 8-9 (Mo. App. W.D. 1998) (also refusing to adopt either test and instead instituting "a balancing test that is akin to the 'sliding scale' approach" where the court considers five factors: "(1) the nature and quality of the contacts with the forum state, (2) the quantity of contacts with the forum state, (3) the relation of the cause of action to the contacts, (4) the interest of the forum state in providing a forum for its residents, and (5) the convenience to the parties"); **District of Columbia:** *Shoppers Food Warehouse v. Moreno*,

instead employ a factual analysis or decide the jurisdictional question on another prong of the specific jurisdiction analysis.[19]

In this case, the Court of Appeals of Georgia has taken the analysis one step further. Although the Court of Appeals is silent on the precise test employed to determine relatedness (to the extent it employs any test at all) the holding of the Georgia Court of Appeals represents a vast expansion of the 'but for' test adopted by other courts. The Court of Appeals has effectively held that a plaintiff's cause of action need not necessarily 'arise out' of the non-resident's contacts with the state at all. Under the Georgia Court of Appeals' decision, contacts that have an ephemeral connection to a cause of action can be sufficient to support specific personal

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746 A.2d 320, 335-36 (D.C. 2000) ("Based upon our review of nexus tests used in other jurisdictions, the criticisms leveled at some of them, and the Supreme Court's admonition that there are no "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction, we see no reason to deviate from-- and thus we reaffirm--our past decisions which have interpreted the "arise from" language of [our long arm statute] flexibly and synonymously with "relate to" or having a "substantial connection with," in the same way that the Supreme Court's due process analysis has used these terms interchangeably. This means that, for the Superior Court to have jurisdiction over [the plaintiff's] claim, the claim had to be related to or substantially connected with [the defendant's] advertising activity in the District . . . that is [] it had to have some "discernible relationship" to [the defendant's] advertising activity.") (internal citations omitted).

[19] *See, e.g., White v. Roberts*, 454 S.E.2d 584, 586 (Ga. Ct. App. 1995) (recognizing the "arise out of or relate to" relatedness requirement, but focusing only on the 'purposeful availment' prong of the specific jurisdiction analysis); *Marten v. Silva* 200 S.W.3d 297, 301-302 (Tex. Ct. App. 2006) (same); *State of S.C. v. Reeves*, 423 S.E.2d 32, 34 (Ga. Ct. App. 1992) (failing to employ any relatedness test but rather, perfunctorily holding that plaintiff's claims "neither arise out of or results from" defendant's contacts with the forum State of Georgia).

jurisdiction over a non-resident defendant. [Pet. App. 5a]. Even the 'but for' analysis requires some causal connection between the defendant's contacts and the cause of action.[20]

The Georgia Court of Appeals' decision raises important questions on just how far courts can stretch the relatedness requirement embodied in the "arise out of or relate to" language of *International Shoe* without violating the Due Process Clause. 366 U.S. at 319.

### C. This Is An Appropriate Case For Resolving The Question Presented.

The case presently before the Court presents an excellent context for deciding this issue. This case illustrates how, without guidance on how to construe the phrase "arise out of or relate to," a court can extend specific *in personam* jurisdiction over a defendant when the defendant's contacts with the forum have little to do with the plaintiff's cause of action. What is clear is that due process demands that a defendant's contacts "arise out of or relate to" the plaintiff's claims. *International Shoe*, 326 U.S. at 319. What is not clear is the precise nexus required in order to satisfy due process.

If this Court declines to review and reverse the decision of the Georgia Court of Appeals, absurd and necessarily unconstitutional results will follow. Under the Georgia Court of Appeals' current holding, a Georgia citizen could travel to Alaska, establish a bank account at a bank there, and when

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[20] *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 383-86 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) ('but for' the advertising, plaintiff would not have gone on a cruise and been injured); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209 (7th Cir. 1984) ('but for' preliminary negotiations of a contract in the forum state, the contract would not have been entered and the breach would not have occurred).

disputes over the account arose, assert personal jurisdiction over the bank in Georgia solely on the basis that statements were routinely mailed to the Georgia citizen at his address in Georgia. The due process clause simply does not contemplate the assertion of jurisdiction under such circumstances. *See Hanson v. Denckla*, 357 U.S. 235 (1958).

The federal and state courts need a decision by this Court as to which analysis of the 'arise out of or relate to' requirement must be used to determine whether jurisdiction may be constitutionally exercised over a non-resident defendant.

## CONCLUSION

First National respectfully submits that this Petition for Certiorari should be accepted.

Respectfully submitted,

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# APPENDIX

**SUPREME COURT OF THE STATE OF GEORGIA**

**CLERK'S OFFICE**

**ATLANTA**

Date: October 02, 2006

William V. Custer IV
POWELL GOLDSTEIN LLP
One Atlantic Center, Fourteenth Floor
1201 West Peachtree Street, N.W.
Atlanta, GA 303093488

Case No. S06C2001

FIRST NATIONAL BANK OF AMES, IOWA v.
INNOVATIVE CLINICAL AND CONSULTING
SERVICES, LLC, d/b/a TOCO HILLS URGENT CARE

COURT OF APPEALS CASE NO. A03A1767

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

**Court of Appeals**

**of the State of Georgia**

**ATLANTA, JULY 10, 2006**

*The Court of Appeals passed the following order*

Case No. A03A1767

FIRST NATIONAL BANK OF AMES, IOWA V. INNOVATIVE CLINICAL AND CONSULTING SERVICES, LLC. D/B/A TOCO HILLS URGENT CARE

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

*Court of Appeals of the State of Georgia*

*Clerk's Office, Atlanta JUL 10, 2006*

*I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court hereto affixed the day and year last above written.*

*Clerk.*

*/s/*_____

**FOURTH DIVISION**
**RUFFIN, C.J.,**
**SMITH, P.J., MILLER, J.**

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5, 2002) http://www.gaappeals.us/rules/

**June 20, 2006**

In the Court of Appeals of Georgia

A03A1767. FIRST NATIONAL BANK OF AMES, IOWA v. Sm-079 INNOVATIVE CLINICAL & CONSULTING SERVICES, LLC.

SMITH, Presiding Judge.

In *Innovative Clinical and Consulting Svcs. v. First Nat. Bank.*, 279 Ga. 672 (620 SE2d 352)(2005), the Georgia Supreme Court affirmed Division 2, disapproved language in Division 3, and reversed Division 1 of our opinion in *First Nat. Bank v. Innovative Clinical and Consulting Svcs.*, 266 Ga. App. 842 (598 SE2d 530)(2004). The Supreme Court remanded the case to this court for action not inconsistent with its opinion. On remand, applying our Supreme Court's more expansive construction of OCGA § 9-10-01(1), we conclude that the trial court correctly exercised personal jurisdiction over the Iowa bank. We therefore affirm the trial court's denial of the bank's motion to dismiss.

In Division 1 of our prior opinion, we concluded that the trial court had no personal jurisdiction over the bank under subsection (1) of Georgia's Long Arm statute, OCGA § 9-10-91(1).[21] In its opinion, the Georgia Supreme Court recognized that "no explicit legislative limiting conditions" were placed upon subsection 1 of OCGA § 9-10-91. It held that just as we may not expand subsection 3 of the statute in conflict with the express limitations placed upon it by the Georgia General Assembly, so we may not constrict subsection 1 of the statute by engrafting upon it limitations the legislature has not enacted. *First Nat. Bank,* supra, 279 Ga. at 675. The Supreme Court therefore expressly overruled prior decisions "that fail to accord the appropriate breadth to the construction of the 'transacting any business' language of OCGA § 9-10-91(1)." Id. at 676.

In so doing, the Supreme Court also recognized that this court, believing "it was bound by prior precedent,...did not fully consider whether the trial court had personal jurisdiction over the Iowa bank under OCGA § 9-10-91(1)." Id. The Supreme Court therefore vacated Division 1 of our opinion and remanded the case to this court for action consistent with the now-broader scope of OCGA § 9-10-91(1). Id.

Divisions 1 and 3 of our opinion are hereby vacated and the opinion of the Supreme Court made the opinion of this court. As directed, we now consider whether consistent with the maximum extent permitted by procedural due process, the trial court has personal jurisdiction over the Iowa bank.

We conclude, as did the trial court, that it does. Although the bank did not have a physical presence in this

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[21] The facts of this case are fully set forth in *First Nat. Bank,* supra, 266 Ga. App. at 842-843.

state, it is undisputed that the bank had both telephone and written communication with ICCS with regard to the Iowa bank accounts. Without question, those bank accounts were a part of the bank's "business." In the course of that business, when the bank's customer, Med e Fund, failed to make payments on the lease agreement, the bank sought to hold ICCS, a Georgia entity with no connection to Iowa, responsible. Even if the bank did not "regularly" conduct business or engage in a "persistent course of conduct" in Georgia, OCGA § 9-10-91(3), no doubt exists that the bank sought to derive economic benefit from its interstate business activity involving ICCS. To that end, its postal, telephone, and other intangible Georgia contacts suffice to bring it within the purview of OCGA § 9-10-91 (1). See generally *Aero Toy Store, LLC v. Grieves,* ___ Ga. App. _____ (case no. A06A0741, decided May 23, 2006).

[2] We must also consider whether these acts meet the constitutional standard for minimum contacts. See *Coe & Payne Co. v. Wood-Mosaic Corp.,* 230 Ga. 58, 60 (195 SE2d 399)(1973). Clearly, the bank's "business" was not brought to Georgia through a "unilateral action" of ICCS. See *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474-475 (105 SC 2174, 85 LE2d 528) (1985). The bank sought out ICCS when its Iowa customer defaulted, and Georgia has an interest, as does every state, in providing its own citizens with a convenient forum for redressing injuries wrought by non-residents who have sought the state's citizens out for the purpose of business gain. Id. at 473-474

Because the bank transacted some business in Georgia, even if only with this one customer, and because that business was sufficient to meet the constitutional standard for minimum contacts with this state, we conclude that the trial court did not err in denying the bank's motion to dismiss for lack of personal jurisdiction.

*Judgment affirmed. C. J., and Miller, J., concur*

**In the Supreme Court of Georgia**

Decided: Oct – 3 2005

S04G1413. INNOVATIVE CLINICAL AND CONSULTING SERVICES, LLC v. FIRST NATIONAL BANK OF AMES, IOWA.

HUNSTEIN, Presiding Justice.

We granted certiorari from the holding in First National Bank of Ames, Iowa v. Innovative Clinical and Consulting Services, LLC., 266 Ga. App. 842 (598 SE2d 530) (2004) to address perceived inconsistencies in our precedents defining the scope of personal jurisdiction that Georgia courts may exercise over non-residents pursuant to OCGA § 9-10-91, the Georgia long-arm statute. We reiterate our holding in Gust v. Flint, 257 Ga. 129 (356 SE2d 513) (1987), that "[t]he rule that controls is our statute, which requires that an out-of-state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction." Id. at 130. However, because as set forth below we conclude that our earlier opinions have unduly limited the literal language of OCGA § 9-10-91, we reverse in part the holding of the Court of Appeals and remand this case for further consideration by that court.

OCGA § 9-10-91 provides in pertinent part that a court of this State

> may exercise personal jurisdiction over any non-resident..., as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

> (1) Transacts any business within this state;
>
> (2) Commits a tortious act or omission within this state;
>
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;....

Prior to our holding in Gust, this Court in Clarkson Power Flow v. Thompson, 244 Ga. 300, 301 (260 SE2d 9) (1979) expanded subsection (2) to encompass non-residents in those situations where the cause of action arising from injury in Georgia resulted from a tortious act or omission occurring outside this State, see also Shellenberger v. Tanner, 138 Ga. App. 399(2) (227 SE2d 266) (1976), holding that there was "no essential difference" between subsection (2) and (3). Clarkson Power Flow, supra at 301. Because subsection (2), unlike subsection (3), contained no explicit legislative limiting conditions, we held that subsection (2) was constrained only by, and thus was co-extensive with, the Fourteenth Amendment of the U.S. Constitution. Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 61-62 (195 SE2d 399) (1973). See also First United Bank of Miss. v. First Nat. Bank of Atlanta, 255 Ga. 505, 506 (340 SE2d 597) (1986). In Gust the Court rejected these cases and returned to a "literal construction" of OCGA § 9-10-91, Gust, supra, 257 Ga. at 130, thus holding that a non-resident "must do certain acts" as delineated by the statute before the non-resident could be subjected to personal jurisdiction in Georgia. Id. This holding reinstated the difference between subsections (2) and (3) established by the literal language of the statute. Thus, under subsection (2) a Georgia court may exercise personal jurisdiction over a non-resident who commits a tortious act or

omission within this State,[22] insofar as the exercise of that personal jurisdiction comports with constitutional due process; and under subsection (3) a Georgia court may exercise personal jurisdiction over a non-resident who commits a tortious injury in Georgia caused by an act or omission outside Georgia only if the tortfeasor "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state," notwithstanding that these limiting conditions may preclude a Georgia court from exercising personal jurisdiction over the non-resident to the fullest extent permitted by constitutional due process. Gust, supra.[23]

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[22] The Legislature provided only one exception to subsection (2), namely, actions for defamation of character arising from the tortious act.

[23] Dicta in footnote 1 in Allstate Ins. Co. v. Klein, 262 Ga. 599 (422 SE2d 863) (1992), a case involving jurisdiction over a defendant who was a Georgia resident so that OCGA § 9-10-91 was wholly inapplicable, does not support a different conclusion because that footnote cited only to cases rendered prior to Gust, supra. Although the Federal courts persist in reiterating the language from First United Bank of Mississippi, supra, that Georgia's long arm statute confers in personam jurisdiction to the maximum extent allowed by the due process clause of the U.S. Constitution, e.g., Francosteel Corp. v. M/V Charm, 19 F3d 624(IV) (11th Cir. 1994), the First United holding was superseded by Gust, supra. The Eleventh Circuit's interpretation of OCGA § 9-10-91 is not binding on this Court and it is not necessary for this Court to correct erroneous Federal interpretations of our State's statutes for the precedential value of our opinions to remain the controlling authority on the proper interpretation of those statutes. See contra CareKeeper Software Dev. Co. v. Silver, 46 F.Supp.2d 1366, 1369 fn. 1 (N.D.Ga.1999) (following the erroneous interpretation given OCGA § 9-10-91 by Francosteel, supra, because the district court "has not found any contrary Georgia Supreme Court authority decided since the Eleventh Circuit's decision" in that case).

For over 17 years the justices of this Court and the judges of the Court of Appeals have urged the Legislature to amend Georgia's long-arm statute so as to provide the maximum protection for Georgia residents damaged by the out-of-state acts or omissions committed by non-resident tortfeasors. See Gust, supra, 257 Ga. at 130 (Gregory, J., concurring); Phears v. Doyne, 220 Ga. App. 550, 552 (470 SE2d 236) (1996) (Beasley, C.J., concurring). Despite the eloquence of these pleas, the Legislature has chosen to retain the statutory limitations on in personam jurisdiction set forth in OCGA § 9-10-91(3). In our system of checks and balances, it is as inappropriate for the judicial branch to encroach upon the powers of the legislative or executive branches as it would be for either of those branches to encroach upon the powers of the judicial branch. Thus, contrary to the statements in Division 3 of the Court of Appeals' opinion below, the fact that Georgians damaged by non-residents are deprived of a forum in this State to the fullest extent permitted by due process is not the result of court decisions interpreting OCGA § 9-10-91(3) but the result of the plain and unambiguous language of OCGA § 9-10-91. The courts cannot reject the plain language of a statute unless it will result in unreasonable consequences or absurd results not contemplated by the Legislature. See generally Haugen v. Henry County, 277 Ga. 743(2) (594 SE2d 324) (2004); Hollowell v. Jove, 247 Ga. 678, 681 (279 SE2d 430) (1981). Accordingly, under these circumstances, the courts may not interpret OCGA § 9-10-91 to provide what the Legislature chose to omit.

However, our holding in Gust necessarily affects the construction heretofore applied to subsection (1) of OCGA § 9-10-91. That subsection authorizes a Georgia court to exercise personal jurisdiction over a non-resident who "[t]ransacts any business within" Georgia. As is the case with subsection (2), there are no explicit legislative limiting

conditions on this language. Nothing in subsection (1) limits its application to contract cases, but see Whitaker v. Krestmark of Alabama, Inc., 157 Ga. App. 536(1) (278 SE2d 116) (1981); nothing in subsection (1) requires the physical presence of the non-resident in Georgia or minimizes the import of a non-resident's intangible contacts with the State. But see Wise v. State Board &c., of Architects, 247 Ga. 206, 209 (274 SE2d 544) (1981). Although Georgia courts have engrafted these and other requirements onto subsection (1), such requirements conflict with the literal language of the statute. To be consistent with Gust and the well-established rules of statutory interpretation that preclude judicial construction of plain and unambiguous statutory language, Six Flags Over Ga. II v. Kull, 276 Ga. 210, 211 (576 SE2d 880) (2003), we must give the same literal construction to subsection (1) of OCGA § 9-10-91 that we give to the other subsections. Accordingly, under that literal construction, OCGA § 9-10-91(1) grants Georgia courts the unlimited authority to exercise personal jurisdiction over any non-resident who transacts any business in this State. Of course, because this statutory language would expand the personal jurisdiction of Georgia courts beyond that permitted by constitutional due process, we accordingly construe subsection (1) as reaching only "to the maximum extent permitted by procedural due process." Coe & Payne Co., supra, 230 Ga. at 60. See generally Beasley v. Beasley, 260 Ga. 419, 421 (396 SE2d 222) (1990) (explicating the minimum contacts required for proper exercise of long arm jurisdiction). See also Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102(II)(A) (107 SC 1026, 94 LE2d 92 (1987) (due process clause of the Fourteenth Amendment constrains states' exercise of personal jurisdiction over non-residents). We hereby overrule all prior cases that fail to accord the appropriate breadth to the construction of the "transacting any business" language of OCGA § 9-10-91(1).

The Court of Appeals in this case correctly recognized that the trial court did not have personal jurisdiction over the Iowa bank under subsections (2) and (3) of OCGA § 9-10-91 because no question of fact remains[24] that the Iowa bank did not commit a tortious act within Georgia and that the Iowa bank does not regularly conduct or solicit business in Georgia, engage in any other persistent course of conduct in Georgia or otherwise derive substantial revenue from goods used or consumed or services rendered in Georgia.[25] However, because it was bound by prior precedent, the Court of Appeals did not fully consider whether the trial court had personal jurisdiction over the Iowa bank under OCGA § 9-10-91(1), limiting its review to ICCS's breach of contract claim and that evidence establishing the lack of physical contacts (i.e., the presence of only postal and telephonic contacts) to connect the Iowa bank with Georgia. That limited review is no longer appropriate. Therefore, we affirm Division 2 of the Court of Appeals' opinion; disapprove the language in Division 3; and vacate and remand Division 1 to the Court of Appeals for action not inconsistent with this opinion.

Judgment affirmed in part, vacated in part and case remanded with direction. All the Justices concur.

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[24] The facts of this case are more fully set forth in First National Bank of Ames, Iowa, supra, 266 Ga. App. at 842-843.

[25] While OCGA § 9-10-91(1) requires only that the non-resident transact any business in Georgia, subsection (3) requires "regular," "persistent" or "substantial" contact with this State in order for Georgia courts to exercise personal jurisdiction over non-resident tortfeasors.

**Court of Appeals**

**of the State of Georgia**

**ATLANTA, APRIL 08, 2004**

*The Court of Appeals passed the following order*

Case No. A03A1767

FIRST NATIONAL BANK OF AMES, IOWA V. INNOVATIVE CLINICAL AND CONSULTING SERVICES, LLC. D/B/A TOCO HILLS URGENT CARE

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

*Court of Appeals of the State of Georgia*

*Clerk's Office, Atlanta APR 08, 2004*

*I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court hereto affixed the day and year last above written.*

*Clerk.*

*/s/* _____ 7

**FOURTH DIVISION**
**SMITH, C.J.,**
**RUFFIN, P.J., MILLER, J.**

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5, 2002) http://www.gaappeals.us/rules/

**March 24, 2004**

In the Court of Appeals of Georgia

A03A1767. FIRST NATIONAL BANK OF AMES, IOWA v. Sm-079 INNOVATIVE CLINICAL & CONSULTING SERVICES, LLC.

SMITH, Chief Judge.

We granted the application of First National Bank of Ames, Iowa (the bank) for an interlocutory appeal. The bank appeals from the trial court's denial of its motion to dismiss for lack of personal jurisdiction the action brought against it by Innovative Clinical & Consulting Services, LLC, d/b/a Toco Hills Urgent Care (ICCS). Because we find that the bank proved lack of jurisdiction under the Georgia Long-Arm statute, OCGA § 9-10-91, and the trial court should have granted its motion to dismiss, we reverse.

The record shows without dispute that ICCS is a medical facility in Atlanta managed in part by Health Care Network Solutions (HNS). HNS entered into two agreements

to outsource some of its billing and collection operations. Under one agreement (the servicing agreement), a company called Med e Fund[26] agreed to advance funds to HNS for its receivables, and to invoice and collect from third-party payors. The other agreement, between ICCS and A.C. Financial Corporation, an affiliate of Med e Fund, was a lease agreement covering certain hardware and software to be installed in ICCS's office to facilitate processing the receivables.

A.C. Financial is based in Ames, Iowa, and it was a customer of the bank. It had several accounts at the bank, and the bank had made secured loans to it. The bank was not a party to either of the agreements in issue. But as collateral for one loan to A.C. Financial, the bank took a security interest in the lease agreement between ICCS and A.C. Financial and ICCS.

After A.C. Financial entered into the lease agreement with ICCS, it opened two bank accounts at the bank's branch in Ames, Iowa. According to Med e Fund's representations to ICCS, one of these accounts was supposed to be a "lockbox" account, where third party payors would send their payments to ICCS. Med e Fund also represented to ICCS that it would advance funds against the receivables and that no funds would be withdrawn from the "lockbox" account without the express approval of ICCS after a periodic accounting. No advances were ever made, no accounting ever took place, and neither account opened at the bank was a "lockbox" account. Instead, A.C. Financial arranged for the bank to debit automatically one of the accounts, into which funds from the third-party payors had been deposited, for the lease payments owed under the agreements. The bank automatically debited these payments through the Automated

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[26] Med f Financial, an affiliated company, was also involved.

Clearing House process. These transactions took place entirely within the State of Iowa.

The equipment leased under the agreement with A.C. Financial was installed in ICCS's office, and ICCS experienced problems with the equipment from the outset. In addition, Med e Fund did not make the lease payments. Because of these problems, when the bank sent signature cards to ICCS for the accounts, ICCS did not sign or return the cards. ICCS sought to resolve difficulties with the bank through various telephone calls and letters, to no avail.

ICCS brought suit against Med e Fund, Med f Financial Corp., and A.C. Financial Corp. in Fulton County Superior Court. The bank was not joined in that action because negotiations with it were still ongoing. This suit against the bank was instituted when negotiations failed and the bank demanded that ICCS make lease payments.

In its complaint, ICCS claimed fraud and conversion, breach of contract, and sought an accounting, injunctive relief, and rescission of both agreements. The bank moved to dismiss on the ground that it was not subject to personal jurisdiction in Georgia because it did not transact business here, nor did it regularly do or solicit business or engage in any other persistent course of conduct here. The trial court denied the motion but granted a certificate of immediate review, and we granted this appeal.

Personal jurisdiction of state courts over non-residents has long been the subject of case law, invoking constitutions and statutes at both the federal and state levels. The United States Supreme Court has held that "[a] State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors," particularly when these actors "purposefully derive benefit from their interstate activities. [Cits.]" *Burger King v.*

*Rudzewicz*, 471 U.S. 462, 473 (105 SC 2174, 85 LEd2d 528) (1985). But the state's interest must be bounded by the Due Process clause of the U.S. Constitution.

> [T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State. The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id. at 474-475.

Georgia's Long Arm statute, OCGA § 9-10-91, provides in pertinent part:

> A court of this state may exercise personal jurisdiction over any non-resident . . . as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he
>
> (1) Transacts any business within this state;
>
> (2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
>
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-

> feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

The question we address in this case is whether the bank's conduct is covered under any of these three subsections of OCGA § 9-10-91.

1. We first address whether jurisdiction over the bank for ICCS's contract claims is established under subsection (1) of the Act.

(a) The existence of the bank accounts does not show that the bank purposefully availed itself of the privilege of doing business in Georgia. The bank must have purposely done some act in Georgia to be subject to our courts. *Stuart v. Peykan, Inc.*, 261 Ga. App. 46, 48(1) (581 SE2d 609) (2003). The bank's contacts with Georgia must have been such that it should have reasonably anticipated that it would be haled into court here. Id. Here, the bank accounts were opened by an Iowa resident at an Iowa bank. The bank's only contacts with Georgia were the exchanged letters and telephone calls with ICCS regarding the accounts, and mail and telephone contact alone have been held to be insufficient to establish the purposeful activity necessary for personal jurisdiction. Id.

(b) The Act provides that the requisite contacts may be made by an agent, as well, and ICCS argues that A.C. Financial was the bank's agent for purposes of this lawsuit. It is clear that A.C. Financial, although based in Iowa, "transacted business" in Georgia. It solicited ICCS's business in this state, and the contracts were signed here. But we cannot agree with ICCS that A.C. Financial was the bank's agent. In support of its motion to dismiss, the bank presented the affidavits of its president showing that the bank's

relationship with A.C. Financial was nothing more than that of bank and customer and that A.C. Financial was not its agent. ICCS has not presented any evidence to rebut these sworn statements. The bank's affidavits denying an agency relationship cannot be overcome by the bare conclusory allegation made by ICCS. *Coopers & Lybrand v. Cocklereece,* 157 Ga. App. 240, 245 (2), (276 SE2d 845) (1981).

(c) ICCS maintains that jurisdiction under subsection (1) of the Act is established because it asserted a right to rescind the two contracts it entered into with other parties. But the bank was not a party to either of these contracts, and it follows that the bank's conduct is not covered under subsection (1).

(d) ICCS also argues that the bank's security interest in the lease contract constitutes the purposeful conduct required under the Act. But not one of ICCS's causes of action sounding in contract is remotely related to the security interest taken by the bank, nor has the bank foreclosed its interest, so as to become a party to the contract. For personal jurisdiction to be asserted over a non-resident, the litigation must result from alleged injuries that arose out of the non-resident's activities. *Stuart,* supra, 261 Ga. App. at 48 (1). We conclude that personal jurisdiction over the bank may not be asserted under subsection (1) of the Act.

2. The bank also contends that it cannot be subject to personal jurisdiction in Georgia under subsections (2) and (3) of the Act, which address tortious conduct. We agree. Under these subsections, a non-resident may be required to litigate in a Georgia forum if it has either committed a tortious act within this state or committed an act or omission outside this state that causes an injury in this state, but only "if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial

revenue from goods used or consumed or services rendered in this state." OCGA § 9-10-91(3).

The bank's affidavits also show that the bank "does not regularly conduct or solicit business in the State of Georgia; does not engage in any other persistent course of conduct in the State of Georgia; and does not derive substantial revenue from goods used or consumed or services rendered in the State of Georgia." Even were we to find that the bank committed a tortious act, it would be subject to personal jurisdiction only if it regularly does or solicits business here. The undisputed evidence shows that it does not.

*National Egg Co. v. Bank Leumi le-Israel,* 514 FSupp. 1125 (N.D. Ga. 1981), relied upon by ICCS, is similar in some ways to this case. In *National Egg Co.,* the district court applied Georgia law to find personal jurisdiction under the Long Arm statute when a bank committed a tort to protect a security interest. But there, the record showed the bank's "intentional contact [with] three Georgia agricultural companies besides" National Egg Co., as well as the physical presence in Georgia of a bank vice-president. Id. at 1128. The district court concluded that because of these additional contacts, the Act was satisfied and the due process clause of the U.S. Constitution was not offended. Here, however, no "additional contacts" are shown by the record, the bank did not do or solicit business regularly in Georgia, and we conclude that the requirements of the Act were not satisfied.

Because the record does not show the requisite minimum contacts, we need not address ICCS's position that the bank is subject to personal jurisdiction in Georgia because of an alleged conspiracy to defraud. We note, however, that more than a mere allegation of conspiracy with a Georgia resident is required to support personal jurisdiction under the

Act. Compare *Rudo v. Stubbs,* 221 Ga. App. 702, 704 (472 SE2d 515) (1996).

3. Finally, we also note that the stated policy of our courts has long been to interpret the Act so as to exercise "jurisdiction over non-residents to the maximum extent permitted by [procedural] due process. [Cit.]" *First United Bank v. First Nat. Bank,* 255 Ga. 505, 506, (340 SE2d 597) (1986); *Bradlee Mgmt. Svcs. Inc. v. Cassells,* 249 Ga. 614, 617, (292 SE2d 717) (1982); *Yukon Partners, Inc. v. Lodge Keeper Group, Inc.* 258 Ga. App. 1, 4, (572 SE2d 647) (2002). Our Supreme Court attempted to interpret the Act broadly in *Coe & Payne Co. v. Wood-Mosaic Corp.,* 230 Ga. 58 (195 SE2d 399) (1973) and *Clarkson Power Flow v. Thompson,* 244 Ga. 300 (260 S.E.2d 9) (1979). But it is apparent that since the Supreme Court's decision in *Gust v. Flint,* 257 Ga. 129 (356 SE2d 513) (1987), the decisions of our courts have consistently adopted a narrower interpretation of the Act.

In *Gust,* the Supreme Court refused to enter into a discussion of the merits of other states' "rules" governing minimum contacts, holding unequivocally that "[t]he rule that controls is our statute, which requires that an out-of-state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction. Where, as here, it is shown that no such acts were committed, there is no jurisdiction." Id. at 130. Subsequent cases have held to the standard that mail, telephone, or facsimile machine contact was insufficient to confer personal jurisdiction. See, e.g., *Stuart,* supra; *ETS Payphone v. TK Indus.,* 236 Ga. App. 713, 715 (1), 513 SE2d 257) (1999); *Phears v. Doyne,* 220 Ga. App. 550, 551(1) (470 SE2d 236) (1996).

We agree with some critics that if indeed Georgia's policy is to exercise jurisdiction over non-residents to the full extent permitted by due process, given today's commercial

practices our courts' interpretations of the Act have not met its intended and declared policy. Certainly, our decisions may not provide Georgians who are damaged by non-residents a forum in this state to the fullest extent permitted by the due process clause of the U.S. Constitution. As an intermediate appellate court for the correction of errors, however, we are bound to follow *Gust* and its progeny in finding in this case that mail and telephone contact is insufficient to satisfy the minimum contact required under the statute, even in fraud claims. We do not mean to declare that a broader interpretation of the Act would in this case provide ICCS with redress for the bank's actions or omissions. We hold only that it is clear under binding precedent that because the bank engaged in contact with ICCS only by mail and telephone and did not regularly do business in this state, redress may not be sought in a Georgia court.

*Judgment reversed. RUFFIN, P.J., and MILLER, J., concur.*

**IN THE SUPERIOR COURT OF FULTON COUNTY**

**STATE OF GEORGIA**

| | | |
|---|---|---|
| Innovative Clinical and Consulting Services, LLC d/b/a/ Toco Hills Urgent Care, | ) | |
| Plaintiff, | ) | Civil Action File No. 2001CV46283 |
| v. | ) | |
| First National Bank of Ames, Iowa, | ) | |
| Defendant. | ) | |

**ORDER DENYING MOTION TO DISMISS**

Defendant's Motion to Dismiss on jurisdictional grounds having come on for a regularly scheduled hearing, and after hearing arguments of counsel and considering the record (there being no new evidence introduced at the hearing), the Court hereby denies said Motion.

This 23rd day of December, 2002, nunc pro tunc November 21, 2002.

/s/
Judge T. Jackson Bedford, Jr.

Prepared by:
Tyler C. Dixon
Raiford & Dixon, LLP
201 Allen Road, Suite 310
Atlanta, Georgia 30325
(404) 847-0860

**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

| | | |
|---|---|---|
| Innovative Clinical and Consulting Services, LLC d/b/a/ Toco Hills Urgent Care, | ) | |
| Plaintiff, | ) | CIVIL ACTION FILE NO. 2001CV46283 |
| v. | ) | |
| First National Bank of Ames, Iowa, | ) | |
| Defendant. | ) | |

**CERTIFICATE OF IMMEDIATE REVIEW**

The Court having entered an Order in this case denying Defendant First National Bank of Ames, Iowa's Motion to Dismiss for Lack of Personal Jurisdiction on the 23rd day of December, 2002, nunc pro tunc to Nov. 21, 2002, which is not subject to direct appeal, it is hereby certified that the Order denying said Motion, in accordance with the provisions of O.C.G.A. § 5-6-34(b), is of such importance that immediate review should be had by the Court of Appeals.

This 23rd day of December, 2002.

/s/
T. Jackson Bedford, Jr.
Judge, Fulton Superior Court